Release of Information and Standards of Conduct.

Subcourse Number MP1024

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4 Credit hours

SUBCOURSE OVERVIEW

This sub course is designed to help you to understand and be able to apply the basic provisions of The Freedom of Information Act (FOIA) and The Privacy Act, as they relate to the release of government records. You will also understand and be able to explain the basic provisions of the Joint Ethics Regulation (JER).

There are no prerequisites for this subcourse.

This sub course reflects the doctrine, which was current at the time it was prepared. In your own work situation, always refer to the latest official publications.

Unless otherwise stated, the masculine gender of singular pronouns is used to refer to both men and women.

Terminal Learning Objective (TLO)

Action: Understand and apply the basic provisions of The Freedom of Information Act (FOIA) and The Privacy Act to the release of government records and the basic provisions of the JER.

Conditions: You will have this subcourse

Standards: To demonstrate competency of this task you must achieve a minimum passing score of 70 percent on the final subcourse examination.

References: AR 25-55, Dept of the Army FOIA Program; AR 340-21, The Army Privacy Program; AR 190-45, Law Enforcement Reporting; AR 530-1, Operations Security (OPSEC); 5 United States Code (USC); Government Organizations and Employees; DoD 5500.7-R, JER.

Table of Contents

Subcourse Overview

Lesson: Release of Information and Standards of Conduct.

PART A: RELEASE OF INFORMATION

PART B: THE PRIVACY ACT

PART C: THE STANDARD OD CONDUCT

Practice Exercise

MP1024 Edition D Examination

LESSON

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Critical Task: None

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INTRODUCTION

Law enforcement operations inevitably generate a large volume of records. These include, of course, such things as police reports and traffic accident reports. Requests for copies of these records (coming from the public or the subject of the record) are also common. A provost marshal office that doesn't understand the basic rules governing the release (and nonrelease) of these records may find itself creating mounds of unnecessary work. It may also find its people in court, explaining what went wrong. Violations of the Privacy Act, for example, can result in civil and criminal sanctions (5 USC Section 552a[g][1] and Section 552a[i][1]). If you know the basic rules, you can respond to the requests quickly and painlessly.

As an example, suppose PVT BLANK is under surveillance by Military Police Investigations (MPI). He is suspected of being a distributor of drugs on post, and is targeted for an undercover buy. He submits a written request asking for all records regarding any undercover surveillance of him, and all such records in general covering the last 6 months. To make things even worse, he also asks for the names, units, and home addresses of all informants. What do you do?

As you shall see, this information will not be released; this sub course will explain why. It is important, however, for you to understand how to handle such a request. Whether the request seems reasonable or outrageous, it cannot simply be ignored. You need to have a basic understanding of when records are releasable and when they can be withheld. Assuming a record is not releasable, you also need to understand how to process the request.

PART A: RELEASE OF INFORMATION

1. General Policies.

a. Army Regulation (AR) 25-55, paragraph 1-300, states, "The public has a right to information concerning the activities of its government. DoD policy is to conduct its activities in an open manner and provide the public with a maximum amount of accurate and timely information concerning its activities, consistent always with the legitimate public and private interests of the American people." Also, "DoD personnel are expected to comply with the provisions of the FOIA and this regulation in both letter and spirit." (AR 25-55, paragraph 1-500).

b. Similarly, it is Army policy to protect the privacy of individuals from unwarranted intrusion.The Army should collect personal information only when it is legally authorized and necessary tosupport Army operations. The Army must also safeguard personal information to prevent unauthorized use, access, disclosure, alteration, or destruction. (AR 340-21, paragraph 1-5).

c. The policies apply to law enforcement records. The maximum amount of law enforcement information available, consistent with applicable Headquarters, Department of the Army (HQDA) policies and appropriate regulations, will be furnished on request. (AR 190-45, paragraph 3-1a). The release of such records must be in accordance with (IAW) the FOIA and the Privacy Act (AR 190-45, paragraph 3-4).

NOTE: DA Officials who release records under the FOIA must also consider OPSEC. The Army implementing regulation is AR 530-1. AR 25-55, paragraph 5-100, gives the procedures for FOIA personnel and the Initial Denial Authority (IDA) to follow when a FOIA appears to involve OPSEC. If you feel that the requested records involve OPSEC, coordinate the matter with the installation FOIA advisor.

2. Purpose of the Laws:

The FOIA was passed to ensure access to government records (1974 US Code, Congressional and Administrative News 6268). At the same time, however, congress determined that the right to privacy "is a personal and fundamental right." In order to protect it, congress enacted laws "to regulate the collection, maintenance, use, and dissemination of information." (1974 US Code, Congressional and Administrative News 2176).

In the Privacy Act, congress determined that the right to privacy "is a personal and fundamental right." (1974 US Code, Congressional and Administrative News 2176). The congressional hearings, which produced the Privacy Act, revealed that the government was acquiring all sorts of highly personal information, much of it irrelevant to the purposes for which it was being collected. As an example, applicants for government jobs had to respond to questions like, "I believe there is a God, " I believe in the second coming of Christ," and "many of my dreams are about sex matters." (Department of the Army Pamphlet [DA PAM] 27-21, paragraph 9-4).

3. The FOIA (5 USC Section 552) - A Disclosure Statute.

Disclosure is the rule, not the exception. FOIA is a disclosure statute. This means that a record may be withheld, "only when it is exempt from mandatory public disclosure." (AR 25-55, paragraph 1-300). In other words, the act sets out certain categories of information that are exempt from mandatory disclosure. Unless a record falls under one or more of these exceptions, it is to be released. The government, then, has the burden of justifying its failure to release the record. The requester does not have the burden of proving they are entitled to the record. Rather, the burden is on the government to justify its nonrelease. Remember, records that are not specifically exempt from disclosure "shall, upon request, be made readily accessible to the public." (AR 25-55, paragraph 1-501).

4. FOIA - The Request for Records.

a. What is a "record?" A "record" is defined as "the products of data compilation, regardless of physical form or characteristics, made or received by a DoD component in connection with the transaction of public business and preserved by a DoD component primarily as evidence of the organization, policies, functions, decisions, or procedures of the DoD component." This does not include everything in possession of an agency. It does not include the following:

(1) Library and museum material made, acquired, and preserved solely for reference or exhibition.

(2) Objects or articles, like structures, furniture, paintings, sculpture, three-dimensional models, vehicles, and equipment, whatever their historical value, or value as evidence.

(3) Commercially exploitative resources, including but not limited to formulas, designs, maps and charts, map compilation manuscripts and map research materials, research data, computer programs, and technical data packages that were not created and are not utilized as primary sources of information about organizations, policies, functions, decisions, or procedures of a DoD component.

(4) Unaltered publications and processed documents, such as regulations, manuals, maps, charts, and related geophysical materials that are available to the public through an established distribution system with or without charges.

(5) Anything that is not a tangible or documentary record, such as an individual's memory or oral communication.

(6) Personal notes of an individual not made available to other persons in an agency and not filed with agency records. In other words, if the notes are used to document a personnel action or disciplinary action, they no longer are "personal."

(7) Information stored within a computer for which there is no existing computer program or printout. Within the DA, information stored in a computer for which there is no existing software program to extract the information or a printout of the information. (AR 25-55, paragraph 1-402b).

b. Nonexistent records. A record must exist and be in the possession and control of the DoD at the time of the request. There is no obligation to create, compile, or obtain a record to satisfy an FOIA

request (AR 25-55, paragraph 1-506). If we used to have it (but do not anymore), there is no duty to retrieve it or create another one to replace it.

c. Referrals. If we do not have the record, but we know that another DoD component does, we simply refer the request and so notify the requester (AR 25-55, paragraph 1-508a). Also, we may hold records loaned to us by the Federal Bureau of Investigation (FBI), as an example, where we have possession but not the control necessary to release the record. In such a case, we would, again, refer the request to the agency with control over the record, in this case, the FBI (AR 25-55, paragraph 1-508c), and also notify the requester of the referral. Within the Army, referrals will be made directly to offices that may have custody of requested records. If the office receiving the FOIA request does not know where the requested records are located, the request, and an explanatory cover letter will be forwarded to the Army Freedom of Information and Privacy Act Division, Information Systems Command, at the Pentagon. Always keep in mind that "DoD components shall ensure that procedural matters do not unnecessarily impede a requester from obtaining DoD records promptly" (AR 340-17, paragraph 1-502).

d. Who can request a record? A member of the public may make an FOIA request (AR 25-55, paragraph 1-401). FOIA speaks of release to any person (5 USC Section 552[a] [3]). This is not limited to natural persons, and includes corporations, businesses, associates, etc. A person can request government records in general, or those on specific people. As a member of the public, they can also ask for records that pertain to themselves.

e. The vague request must reasonably describe the record that is sought (5 USC Section 552[a] [3]). It is the responsibility of the requester to provide a description of the desired record, which enables the government to locate the record with a reasonable amount of effort. The act does not authorize "fishing expeditions." (AR 25-55, paragraph 1-507a). A description is adequate if it enables the DoD component, "to locate the record with reasonable effort" (paragraph 1-507e). A request must contain sufficient information "to permit the conduct of an organized, nonrandom search based on the component's filing arrangements and existing retrieval systems" (paragraph 1-507). A requester who submits such an unclear request will be notified of this fact in writing. This letter will describe the defects in the request, explain the types of information that must be furnished and point out that "no action will be taken on the request until he responds to the letter" (AR 25-55, paragraph 1-507a).

f. The requester's purpose. With the exception of the personal privacy exemption (which we will look at later), the requester's purpose in wanting the records is usually not material. Further, the requester is not required to state a purpose. Unless the record falls under one of the exceptions, the record is to be released to him. Remember, the requester does not have to establish that he is entitled to the release; it is the government's burden to establish a no release. Unless the government can do so, the record is releasable.

g. Costs. The records that are requested need not be provided free of charge. Fees may be charged for search, duplication, and review when the records are requested for commercial purposes. If the records are sought for a noncommercial use and an educational or noncommercial scientific institution makes the request, whose purpose is scholarly or scientific research, or by the news media, then fees are limited to duplication charges. For other requests, reasonable search, and duplication charges are permitted. The duplication fees are set out in AR 25-55, paragraph 6-202.

(1) The search fees are also set out in AR 25-55 at paragraph 6-201(a):

Type	Grade	Hourly Rate ($)

Clerical	E9/GS8 and below	$12.00
Professional	01-06/GS9-GSGM 15	$25.00
Executive	07-GS/GM16/ES1 and above	$45.00

(2) There is a waiver of fees if the costs are less than $15. Requests submitted by representatives of educational or noncommercial scientific institutions or of the news media shall be limited to only reasonable standard charges for document duplication (excluding charges for the first 100 pages). Above $15, costs may still be waived on a case-by-case basis. "Documents shall be furnished by Army activities without charge or at reduced charge where they determine that waiver or reduction of fees is in the public interest because furnishing the information can be considered as primarily benefiting the general public." (AR 25-55, paragraph 6-103).

(3) In determining fee waivers of reduction, relevant factors are in AR 25-55, paragraph 6-103(c):

(a) Disclosure of the information "is in the public interest because it is likely to contribute significantly to public understanding of the operations of the government."

1. The subject of the request. Components should analyze whether the subject matter of the request involves issues that will significantly contribute to the public understanding of the operations or activities of the DoD.

2. The informative value of the information to be disclosed. This factor requires a close analysis of the substantive contents of a record to determine whether disclosure is meaningful, and shall inform the public on the operations or actions of the DoD.

3. The contribution to an understanding of the subject by the general public likely to result from disclosure. The key element in determining the applicability of this factor is whether disclosure will inform, or have the potential to inform the public, rather than simply the individual requester or a small segment of interested persons.

4. The significance of the contribution to public understanding. Components must differentiate the relative significance or impact of the disclosure against the current level of public knowledge, or understanding that exists before the disclosure.

(b). Disclosure of the information "is not primarily in the commercial interest of the requester."

(4) The requester is not required to state a reason for wanting the requests. The record must be released unless it is exempt from disclosure. If the requester fails to establish that waiver/reduction of fees is appropriate, the agency is not required to provide the records at no cost. This doesn't mean that the records are exempt; rather, it simply means that he'll have to pay for the records (assuming it goes over the $15 limit, etc.). Requests for a waiver of fees are submitted along with the request. The initial determination of whether to make a record available or grant a fee waiver upon request may be made by any suitable official designated by the DoD Component in publishing regulations. In the Army, IDAs may delegate all or part of their authority to an office chief or subordinate commander.

(5) There are time limits for responding to FOIA requests. If the requester says he will not pay any costs and doesn't substantiate a request for a waiver of fees and if the fees exceed $15, the request will not be processed; instead, the requester will be informed of the costs. Until he offers to pay, the request will not be processed (AR 25-55, paragraph 6-104[b] [2]). The same thing happens if the requester says

nothing about fees and does not substantiate a request for a waiver of fees, but the fees exceed $15. Here, again, the request is not processed until the requester is advised of anticipated charges and agrees to pay them. Sometimes, the requester agrees to pay up to a certain amount, yet does not substantiate a request for waiver. In this case, the specified amount will not be exceeded without the requester's consent (AR 25-55 paragraph 6-104-[b] [4]).

(6) Payment may be required in advance, before processing the request (AR 25-55, paragraph 16-104[b] [4]). This is considered appropriate only when the requester has previously failed to pay fees in a timely fashion, or the fee will exceed $250. Also, "subsequent requests from persons who fail to discharge fee obligations need not be processed until previous obligations have been discharged or waived" (AR 25-55, paragraph 6-104[b] [7]).

5. Processing FOIA Requests.

a. There is a 10-day time limit (working days) for responding to an FOIA request. This is imposed both by regulation (AR 25-55, paragraph 1-503), and by federal law (5 USC Section 552 [a] [6]). The time limit starts only when the request is in writing and reasonably describes the record(s) requested. The request must either offer to pay fees, be below $15 limit on automatic waiver, or substantiate a request for waiver/reduction of fees. Also, the request must be received by the proper official (AR 25-55, paragraph 1-503). Appendix B to AR 25-55 lists the proper officials for various types of records.

Note: Remember that if the wrong office receives a request, it is to be referred to the office that does have the record (AR 25-55, paragraph 1-508).

b. A request "should refer explicitly or implicitly to the FOIA," as this will ensure a prompt response (AR 25-55, paragraph 1-503b). Requests will have the date and time stamped on the receipt (paragraph 5-204a). The requester is to be given a response within 10 working days. If the record is to be released, the office that received the request should do so promptly (AR 25-55, paragraph 5-204b). If the records are not going to be released (they are exempt from disclosure), the matter must be forwarded to HQDA for a decision. In this event, the requester will be notified that the request has been forwarded to HQDA. At the installation, you can make the decision to release; you cannot, however, make the decision to deny. This is done at HQDA. What should happen in such an event is recommend denial and forward the matter to HQDA for a decision. Remember, the requester must be notified in 10 days.

(1) Sometimes, the 10-day limit may be difficult to meet. Informal coordination with the requester is encouraged (AR 25-55, paragraph 5-205d). If the time limit cannot be met, coordinate with the Judge Advocate General (JAG); do not simply ignore the time limits as this could generate a needless court case. There is a procedure for formally obtaining an extension from HQDA, but do not attempt this on your own. It requires coordination with the Office of the Army General Counsel (AR 25-55, paragraph 5-205b).

(2) Sometimes, only part of a record is to be released. If part is exempt, release what is not exempt. As to the rest (what is not releasable), treat it as a recommended denial and forward it to HQDA (AR 25-55, paragraph 1-504b).

The Initial Denial Authority (IDA). The decision to deny a request is not made at the installation level; rather, the request is forwarded to HQDA. The same is true for the decision to deny a request for a fee waiver. When the request is forwarded up to HQDA, send a copy of

the request itself, the record(s) requested, and an explanation of the recommendation for denial of release. AR 25-55, paragraph 5-200 c, requires prior telephonic coordination. The number is DSN 227-4122 or commercial (703) 697-4122.

The official at HQDA who has the authority to make the decision to deny release is the, "IDA." There are different IDAs at HQDA, depending on the type of record that is involved. AR 25-55, paragraph 5-200d lists them. As an example, the Comptroller of the Army is the IDA for, "requests for finance and accounting records." The Commanding General, United States Army Criminal Investigations Command (USACIDC), is the IDA for "criminal investigative records of USACIDC HQ and its subordinate activities." This includes criminal investigative records, investigation in-progress records, and MP records that result in criminal investigation reports. The Deputy Assistant Secretary of the Army/Director of Civilian Personnel is the IDA for "civilian personnel records, personnel administration, and other civilian matters." The Surgeon General is the IDA for "medical research and development records, and the medical records of active duty military personnel, dependents, and persons given physical examinations or treatment at DA medical facilities, to include alcohol and drug treatment/test records."

Remember, at the installation, only a recommendation for denial of release may be made. The initial determination of whether to make a record available may be made by any suitable official designated by the DoD Component in publishing regulations. In the Army, IDAs may delegate all or part of their authority to an office chief or subordinate commander. The decision to deny is made by the IDA or his designated representative, who may or may not go along with the recommendation. The IDA will make an independent determination. In other words, the recommendation to deny release is only a recommendation; the IDA is not bound by it.

6. FOIA Exemptions. Remember, FOIA is a disclosure statute. That means that the government has the burden of justifying nondisclosure. The requester does not have to prove that he is entitled to the record. The requester will get the record unless the government can establish that the record cannot be disclosed, or is exempt from mandatory disclosure. To be exempt, a record must fall under one or more of nine exemptions. One is sufficient to justify nondisclosure, although a record could fall under two or even several exemptions.

a. Classified records. This covers material properly and currently classified in the interest of national defense or foreign policy, as specifically authorized under the criteria established by executive order and implemented by regulations, such as DoD 5200.1-R (Reference [h]) (AR 25-55, paragraph 3-200).

Although material is not classified at the time of the FOIA request, a classification review may be undertaken to determine whether the information should be classified. The procedures in AR 25-55, paragraph 5-100 c (4) apply. This will require coordination with the OPSEC adviser at command level (paragraph 5-100 [c]). Another possibility is that several unclassified documents, or parts of them, "could combine information that together might violate national security." In such a case, "consider classifying the combined information" (paragraph 5-100 [c][3]).

In one case, the Army received a FOIA request for Measures Resource Area Ratings (MRAR) of 168 battalions and separate commands that comprised all of the major combat units of the Army. These were made up of unit status reports, designed to assess total force readiness. The individual unit ratings, however, were unclassified. Based on a compilation of the single ratings, however, one could determine the combat potential of the entire Army, as well as the relative strengths of individual units.

Such information, if unclassified, could properly be classified following receipt of a FOIA request. Taylor vs. DA, 684 F. 2d 100 (DC Cir. 1982).

b. Matters related solely to the internal personnel rules and practices of an agency: This covers records "containing or constituting rules, regulations, orders, manuals, directives, and instructions relating to the internal personnel rules and practices of an agency if their release to the public would substantially hinder the effective performance of a significant function of the DoD, and they do not impose requirements directly on the general public." Examples are, "those operating rules, guidelines, and manuals for the DoD investigators, inspectors, auditors, or examiners that must remain privileged in order for the DoD component to fulfill a legal requirement," and "personnel and other administrative matters, such as examination questions and answers used in training courses, or in the determination of the qualifications of candidates for employment, entrance on duty, advancement or promotion" (AR 25-55, paragraph 3-200). This exemption does not apply to matters that are, "subject to a genuine and significant public interest." Department of the Air Force vs. Rose, 48 L. Ed. 2d11 (1976). It is DoD policy that personnel lists of military and civilian employees are normally not releasable. There is no legitimate public interest in disclosure and processing such requests and they can create an administrative burden. Accordingly, requests for such rosters will normally result in the forwarding of a recommendation for denial to the IDA. If, however, there is a legitimate public interest in a particular disclosure of such a personnel list, it must still be forwarded to the IDA, recommending release.

c. Disclosure Prohibited by Federal Statutes. This makes FOIA consistent with other federal laws. In other words, is there some other federal law that prohibits disclosure of the record? If so, FOIA does not override it and mandate disclosure. An example is 42 USC Section 2162 (reference [j]), which governs the release of restricted data and formerly restricted data. Here, then, we must look to the existence of a federal law that specifically exempts the record from disclosure (AR 25-55, paragraph 3-200).

d. Trade Secrets and Commercial/Financial Information. The first is trade secrets, and the second is commercial or financial information, which is obtained from a person, and which is privileged or confidential (AR 25-55, paragraph 3-200). The issue here is whether release would cause substantial harm to the competitive position of the source providing the information or would impair the government's ability to obtain necessary information in the future. (AR 25-55, paragraph 3-200). This covers material that the agency, "receives from a person or organization outside the government with the understanding that the record will be retained on a privileged or confidential basis. It includes commercial or financial information received in confidence in connection with loans, bids, contracts, or proposals, as well as other information received in confidence or privileged, such as trade secrets, inventions, discoveries, or other proprietary data. It also covers personal statements given in the course of inspections, investigations, or audits, when such statements are received in confidence from the individual and returned in confidence because they reveal trade secrets or commercial or financial information normally considered confidential or privileged" (AR 25-55, paragraph 3-200).

e. Interagency or Intraagency Memoranda or Letters. This covers internal decision-making communications and involves such things as "internal advice, recommendations, and subjective evaluations," as opposed to factual matters (AR 25-55, paragraph 3-200). It is intended to protect the deliberative process and "to assure the full and frank exchange of opinions in making government decisions" (DA PAM 27-21, paragraph 9-3a). It protects only Predecisional communications, which are those made prior to the agency's final decision. The privilege remains, however, even after the decision has been made, unless the final decision expressly adopts the

predecisional memorandum. This is intended to protect the agency's "decision-making process." Some examples are as follows:

(1) The nonfactual portions of staff papers, to include after-action reports and situation reports containing staff evaluations, advice, opinions, or suggestions.

(2) Advice, suggestions, or evaluations prepared on behalf of the DoD by individual consultants or by boards, committees, councils, groups, panels, conferences, commissions, task forces, or other similar groups that are formed for the purpose of obtaining advice and recommendations.

(3) Records that are exchanged among agency personnel and within and among DoD components or agencies as part of the preparation for anticipated administrative proceedings by an agency or litigation before any federal, state, or military court, as well as records that qualify for the attorney-client privilege.

f. Personnel and Medical Files and Similar Files the Disclosure of Which Would Constitute a Clearly Unwarranted Invasion of Personal Privacy. This includes files containing reports, records, and other material pertaining to personnel matters in which administrative action, including disciplinary action may have been taken. In determining whether release could be a clearly unwarranted invasion of personal privacy, consideration shall be given to the stated or ascertained purpose of the request; the public interest in satisfying this purpose must be balanced against the sensitivity of the privacy interest being threatened" (AR 25-55, paragraph 3-200). Remember, a person requesting records under FOIA is not required to state his purpose for wanting the records. That purpose is generally immaterial. With this exemption, however, it is material. Even here, though the requester is not required to state his purpose, he should do so. If no purpose is stated, the agency receiving the request may contact him in order to determine what the purpose is. If no purpose is stated, it is still a valid FOIA request; however, it will probably result in a recommendation for denial of the release. Juvenile records are covered here; other than traffic accident investigations, they normally will be considered exempt from public disclosure.

g. Records or Information Compiled for Law Enforcement Purposes. This shields records compiled for the purpose of enforcing civil, criminal, or military law, and includes the implementation of executive orders or regulations issued pursuant to law. It only applies, however, if release:

(1) Could reasonably be expected to interfere with enforcement proceedings.

(2) Would deprive a person of the right to a fair trial or to an impartial adjudication.

(3) Could reasonably be expected to constitute an unwarranted invasion of personal privacy.

(4) Could reasonably be expected to disclose the identity of a confidential source.

(5) Could reasonably be expected to disclose information furnished by a confidential source.

(6) Would disclose techniques and procedures for law enforcement investigations or prosecution, or would disclose guidelines for law enforcement investigations or prosecution if such disclosure could reasonably be expected to risk circumvention of the law.

(7) Could reasonably be expected to endanger the life or physical safety of any individual. Some examples include statements of witnesses and other material developed during the course of an investigation, as well as materials prepared "in connection with related government litigation or

adjudicative proceedings." It also includes information obtained in confidence, expressed or implied, in the course of a criminal investigation by a criminal law enforcement agency or office within a DoD component, or a lawful national security intelligence investigation. This includes noncriminal investigations, such as an Inspector General (IG) investigation.

h. Records or information compiled by or prepared for a federal agency concerning the examination, operation, or condition/reports of financial institutions—if done for the purposes of regulation or supervision of those institutions.

i. Records containing geological and geographical information and data (including maps) concerning wells.

As you can see, then, FOIA has nine exemptions. A record may fall under one, two, three, or even more. Unless it falls under at least one, it is not exempt from disclosure, which means that it is to be released. Stated another way, if the record falls under at least one exemption, it needn't be disclosed. Even if a record is exempt from mandatory release, the agency may still release it, unless it is covered by exemptions 1, 3, 4, 6 and 7c. Those are not releasable. If the record is covered by some other exception 2, 3, 5, 8, or 9, the agency may still elect to release it when it is determined that no governmental interest will be jeopardized by the release (AR 25-55, paragraph 1-504a). Before doing this, coordinate with JAG.

Also, remember that we will release what is releasable. If part of a record were exempt, we'd treat that part as a recommended denial and release the nonexempt portion. Where all or part of a record is not to be released, the matter will be submitted up to HQDA, to the IDA for a decision. Remember that for MP reports, this is the Deputy Chief of Staff for Personnel (DCSPER). When the request is submitted to the IDA, send a copy of the document requested and identify the portions that you feel are exempt from disclosure, as well as the reason(s) why. Explain the exceptions, which apply (AR 190-45, paragraph 3-4[e] [1] b).

PART B: THE PRIVACY ACT

1. If a person requests government records in general, or those on third parties, it is, of course, an FOIA request. An individual may, of course, ask for his own records. If the requester asks for his own records (medical, finance, etc.), he also has rights under the Privacy Act. The procedures under both laws are very similar. A record will not be withheld under the Privacy Act if it is releasable under FOIA (AR 25-55, paragraph 1-503). A withholding (denial) from the subject of the record must be justified under both Acts (paragraph 1-512b).

The Privacy Act does several things. First, it gives me a right of access to my own records; i.e., those pertaining to me. We will examine this in detail shortly. Second, I may request an amendment of a record on me when I believe such record to be inaccurate as a matter of fact. (AR 340-21, paragraph 2-11c). Third, the act restricts the collection of personal information in the first place, "Only personal information that is necessary to accomplish a purpose or mission of the Army will be maintained in Army systems of records" (AR 340-21, paragraph 4-1c). Fourth, the act provides that "whenever personal information is requested from an individual that will become part of a system of records retrieved by reference to the individual's name or other personal identifier, the individual will be furnished a Privacy Act Statement." This statement includes the authority for collecting the information and the principal purposes for which it will be used (AR 340-21, paragraph 4-2). Finally, the act imposes restrictions on disclosing records to others without the prior consent of the subject of the records. Remember, this does not prevent the release of records that are releasable under FOIA.

The act is an attempt to protect the privacy of individuals from unwarranted intrusion. To do this, it imposes restrictions on both collecting and the release of personal records (paragraph 1-5).

2. The Privacy Act covers records, defined to be any item, collection, or grouping of information about an individual that is maintained by an agency including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particulars assigned to the individual, such as a finger or voice print or photograph (5 USC 552a [a] 4).

Under the Privacy Act, the "record" must be contained within a "system of records." This is defined as "a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual" (5 USC Section 552a [a] 5).

To have rights under the privacy acts, the requester must meet the definition of an individual. This is a citizen of the United States or an alien lawfully admitted for permanent residence (5 USC Section 552a [a] 2).

3. Requests for records under the Privacy Act. Here, the subject of the record is the one who asks for the record. In other words, I am not asking for government records in general or those on somebody else. Either of these, of course, are simply FOIA requests. When I ask for my own records, the Privacy Act also applies. I have a privacy interest, which is protected here, since the records that the government keeps on me can dramatically affect my employment, education, credit rating, etc.

Procedurally, a Privacy Act request is handled similar to an FOIA request. When a person submits a request, which may be oral or written, the record will be furnished unless it is exempt from release. We'll look at the exemptions shortly, and you'll see that they are very similar to the FOIA exemptions. The requester is not required to state a reason for making the request. The request is submitted to the custodian of the record (AR 340-21, paragraph 2-2). The requester may only be charged for reproduction costs. Also, there normally will be no charge for the first copy of a record provided to an individual to whom the record pertains (AR 340-21, paragraph 2-8). After that, fees will be computed according to the charges set out in AR 25-55. Those are the charges we already looked at under FOIA.

The request is to be acknowledged within 10 working days (paragraph 2-2). If possible, the record should be released at that time. If the record is exempt from release under both the Privacy Act and FOIA, then the matter must be forwarded to HQDA. This is to be done within 5 workdays of receipt (AR 340-21, paragraph 2-2). The request is to be submitted along with a copy of the disputed record and the agency's reasons for not wanting to release the documents (AR 340-21, paragraph 2-9). The requester is notified of the referral. An answer to him from HQDA must be forthcoming within 30 days.

This is similar to the Privacy Act. Again, the custodian of the record at the installation may release the record, but he may not make the decision to deny request. Instead, the matter must be forwarded to HQDA for decision.

The official who makes the decision at HQDA is technically called the Access and Amendment Refusal Authority, or AARA for short. This person performs the same function as the IDA for FOIA requests. In fact, it is the same person. For MP records, the AARA is again, the DCSPER (AR 340-21, paragraph 1-7g 2). This covers, of course, investigative records and reports. For the Criminal Investigation Division (CID), investigative records, including MP reports, which are a part of criminal

investigative records, the AARA is the Commanding General (CG), USACIDC (AR 340-21, paragraph 1-7l). For legal records, the AARA is the JAG (AR 340-21, paragraph 1-7i), and it is the Surgeon General for medical records (AR 340-17, paragraph 1-7j).

If you are going to recommend denial of release, you must forward the matter to the AARA. At HQDA, a decision will be made, which may or may not be IAW your recommendation. It is important for you to explain why you are recommending denial.

These procedural requirements are very important. As is the case with FOIA, failing to comply with them can result in civil liability. Willful violation of the law may even result in criminal penalties (AR 340-21, paragraph 4-9).

4. The Privacy Act - Disclosure to the Subject. As a member of the general public, I can request records under FOIA. As we saw, records will be released under FOIA unless they meet one of the nine exemptions. I may also ask for my records under the Privacy Act. Also, remember that a record will be released to the subject of the record unless it is exempt under both (AR 340-21, paragraph 2-3).

As was mentioned earlier, upon receiving an individual's request, the agency shall allow the subject of the records to have access to his records (5 USC Section 552a [d] 1). The individual is not required to state a reason for wanting his records. The subject may be denied access for one of two reasons. The first is where the record was compiled in reasonable anticipation of a civil action or proceeding (AR 340-21, paragraph 2-9[a] 1). This looks to the reason for which the record was made. It covers, for example, an attorney's work product, as well as other matters covered by the attorney-client privilege.

This should sound familiar to you. It is, of course, similar to FOIA exemption #5, which covers "Interagency or Intraagency memoranda or letters." Remember, both laws are similar and, to deny a subject his records, the material must be exempt under both Acts.

The second reason for not disclosing a record under the Privacy Act is that the Secretary of the Army from the disclosure provisions of the Privacy Act properly exempts the record. For this to apply there must also be "a legitimate governmental purpose for invoking the exemption and it is not required to be disclosed under the FOIA" (AR 340-21, paragraph 2-9[a] 2). Remember, to deny me my own records, they must be exempt under both laws. You cannot deny someone their own records under the Privacy Act if they are releasable under FOIA. This way the two laws are consistent. Were it otherwise, a member of the public might get my records under FOIA, but I couldn't get them under the Privacy Act. This would not make any sense.

Under the Privacy Act, there is a general exemption. This exemption covers Army activities actually engaged in the enforcement of criminal laws as their primary function (AR 340-21, paragraph 5-2). This covers such things as police efforts to prevent, control, or reduce crime or to apprehend criminals (5 USC Section 552a [j] 2). To fall under this general exemption, the record must consist of one or more of the following:

a. Information compiled to identify individual criminals and alleged criminals, which consists only of identifying data and arrest records; type and disposition of charges; sentencing, confinement, and release records; and parole and probation status.

b. Information compiled for the purpose of a criminal investigation, including efforts to prevent, reduce, or control crime, and reports of informants and investigators associated with an identifiable individual.

c. Reports identifiable to an individual, compiled at any stage of the process of enforcement of the criminal laws, from arrest or indictment through release from supervision (AR 340-21, paragraph 5-2).

The Secretary of the Army is the official who invokes the exemption (AR 340-21, paragraph 5-1). Apart from the general exemption, which we just looked at, there are also several "specific exemptions." The Secretary of the Army also must claim these. This covers the following:

(1) Classified information in every Army system of records. The AARA must, however, "make sure that it was properly classified."

(2) Investigatory data for law enforcement purposes (other than that claimed under the general exemption). If, however, this information "has been used to deny someone a right, privilege, or benefit to which the individual is entitled by federal law, it must be released, unless doing so would reveal the identity of a confidential source."

(3) Records maintained in connection with providing protective services to the President of the United States or other individuals protected.

(4) Statistical data required by statute and used only for statistical purposes and not to make decisions on the rights, benefits, or entitlement of individuals, except for census records.

(5) Data compiled to determine suitability, eligibility, or qualifications for federal service, federal contracts, or access to classified information. This material may be withheld "only to the extent that disclosure would reveal the identity of a confidential source."

(6) Testing material used to determine if a person is qualified for appointment or promotion in the federal service; this information may be withheld only if disclosure would compromise the objectivity or fairness of the examination process.

(7) Information to determine promotion potential in the armed forces. Information may be withheld, but only to the extent that disclosure would reveal the identity of a confidential source (AR 340-21, paragraph 5-2).

Remember, the Secretary of the Army must claim the exemptions. When properly done, this will exempt the system of records from provisions of the Privacy Act (AR 340-21, paragraph 5-4). An example of an exempt system of records is the one for local criminal information files. This exemption was claimed because release of the information could interfere with proper investigations and the orderly administration of justice. Disclosure of this information could result in the concealment, alteration, or destruction of evidence; the identification of offenders or alleged offenders; the nature and disposition of charges; and jeopardize the safety and well-being of informants, witnesses, and their families and law enforcement personnel and their families. Disclosure of this information could also reveal and render ineffectual investigative techniques, sources, and methods used by this component, and could result in the invasion of the privacy of individuals only incidentally related to an investigation (AR 340-21, paragraph 5-5aa). Such release could also alert the subject as to the nature or existence of the investigation and thereby present a serious impediment to effective law enforcement. It could also compromise the existence of a confidential investigation or reveal the identity of witnesses or confidential informants.

There is a similar exemption for Informant Register Files, as release would seriously impair the prudent and efficient handling of these uniquely functioning individuals and prematurely compromise criminal investigations which either concerns the conduct of the informant, or investigations, wherein he or she is integrally or only peripherally involved (paragraph 5-5 i). Another system of records that has been exempted is traffic law enforcement/vehicle registration system (paragraph 5-5 a b). Here, release could interfere with proper investigations and the orderly administration of justice: the concealment, alteration, or destruction of evidence; the identification of offenders or alleged offenders; the nature and disposition of charges, and jeopardize the safety and well-being of informants, witnesses, and their families. Also, disclosure could reveal and render ineffectual investigative techniques, sources and methods used by this component and could result in the invasion of the privacy of individuals only incidentally related to an investigation. A final example is Family Advocacy Case Management files. Exemptions are needed in order to encourage persons having knowledge of abusive or neglectful acts toward children to report such information and to protect such sources from embarrassment or recriminations as well as to protect their right to privacy. It is essential that the identities of all individuals who furnish information under an express promise of confidentiality be protected. In the case of spouse abuse, it is important to protect the privacy of spouses seeking treatment. Also, granting individuals access to information relating to criminal and civil law enforcement could interfere with ongoing investigations and the orderly administration of justice in that it could result in the concealment, alteration, destruction or fabrication of information; could hamper the identification of offenders or alleged offenders; and the disposition of charges; and could jeopardize the safety and well-being of parents, children, and abused spouses (AR 340-21, paragraph 5-5aj).

You should note the similarities between the Privacy Act exemption and those under FOIA's law enforcement exemption #7. To deny a subject his own records; i.e., those on him, the record must be exempt from disclosure under both laws. This isn't as complex as it may sound since the exemptions are very similar. A law enforcement record that is exempt under the Privacy Act would normally also be exempt under FOIA. This is not always true 100 percent of the time. If the record is exempt under the Privacy Act, you will need to look at FOIA's law enforcement exemption #7. As you recall, that listed seven grounds for withholding the record. If the record meets any of the exemptions, it is not releasable under FOIA either. In that case, it is forwarded to HQDA with a recommendation for denial.

We need to look at each request. It is possible for a record to be exempt under the Privacy Act, but not under FOIA. Don't simply assume that a record is automatically exempt under both. It may be, but this is not always true. In each case, look at the request and the effects of possible disclosure.

To use a couple of examples, suppose Private X is the subject of a law enforcement investigation. He gives you a request for all records pertaining to undercover drug investigations that involve him. Is this releasable? The answer is No. First, remember the Privacy Act's general exemption for law enforcement records. Second, look at FOIA's law enforcement exemption. Under FOIA, the record is not releasable if release would "interfere with enforcement proceedings, disclose techniques and procedures for law enforcement investigations, or endanger the life or physical safety of any individual." The record, then, is exempt under both laws. In this case, then, you would forward the matter to HQDA recommending denial.

On the other hand, suppose PVT X was in a car accident yesterday, in which he ran a stop sign and struck a telephone pole. He requests a copy of the police report, saying he needs it for his insurance company. Here, remember that traffic law enforcement reports are exempt from disclosure under the Privacy Act. To withhold the record, then, it would also have to be exempt under FOIA. Disclosing a routine traffic accident report would not interfere with enforcement proceedings or jeopardize investigative techniques. It won't jeopardize the lives of our police or informants and, since the subject is the one making the request, it doesn't involve an unwarranted invasion of personal privacy. The record doesn't fall under FOIA's law enforcement exemption #7, so it would be releasable. In practical terms, there is no reason <u>not</u> to do so.

Suppose, however, I have requested the accident report on a case that I wasn't involved in? What if you were in the accident, and I'm just curious? Here the situation is different. Disclosure would be an unwarranted invasion of your privacy under FOIA's law enforcement exemption, as well as exemption #6 (clearly unwarranted invasion of personal privacy). Unless a valid need for the record is stated, which may be difficult, the result will be a recommended denial of the request.

5. The Privacy Act - Restrictions on Disclosure to Others.

a. So far, we have looked at the Privacy Act in terms of granting the subject access to his own records. This is certainly very important, as it helps ensure that records are timely, accurate, complete, and relevant to the purpose for which they are collected (AR 340-21, paragraph 1-5c). It also, as we saw, gives the subject a right to challenge records and request an amendment of them. To do this, of course, the individual must show that the records are factually in error, not up-to-date, not complete, or not relevant" (AR 340-21, paragraph 1-5 f). By giving the subject access to his records, he can determine what records exist (subject to the exemptions we have looked at). This ensures that the agency keeps only personal information about an individual that is legally authorized and necessary to support Army operations (paragraph 1-5b). As an example, there is a general prohibition against keeping records on how an individual exercises rights guaranteed by the first amendment" (paragraph 4-5). Also, as we saw, the Privacy Act requires the use of a Privacy Act Statement, which tells the subject why the information is being requested, and the principal purposes (routine uses) for which it will be used (paragraph 4-2a). While all of these are certainly important interests, they are not alone sufficient to protect an individual's personal privacy from abuse. The Privacy Act, therefore, imposes restrictions on the release of this information to others; i.e., to those third parties who are not the subject of the record. It restricts the disclosure of records to third parties without obtaining the prior written consent of the data subject (AR 340-21, paragraph 3-1 b).

b. Disclosure without Consent. The Army is prohibited from disclosing a record from a system of records without obtaining the prior written consent of the data subject, except under one of the following situations. We could, of course, release if he consents. Here though, we are speaking of release without consent.

(1) Disclosure to officers and employers of DoD who have a need for the record in the performance of their duties (AR 340-21, paragraph 3-1a). An example is the dissemination of information between MP and USACIDC elements (AR 190-45, paragraph 3-2).

To use another example, suppose the CID is conducting an investigation of several burglaries on post. All of the victims are in Company A, as is your suspect. Release to the commander is lawful where there is a demonstrable need for the information. This means that the record is necessary for the accomplishment of a function properly within the purview of the requesting activity and prescribed by DoD directive/regulation or AR (AR 190-45, paragraph 3-2). More specifically, disclosure to commanders and designated commander's activities is appropriate when it is necessary for the commander's conduct of criminal justice responsibilities and/or crime prevention (AR 190-45, paragraph 3-2).

To use another example, suppose SSG X is currently the subject of a criminal investigation that is being worked on by the Family Advocacy Case Management Team (FACMT). Can you brief his commander on the case? Yes, based on the commander's official need to know. AR 608-10, which sets up the FACMT, makes the commander a key participant in the military community's response to spouse and child abuse. To perform his job, the commander needs the facts. The same is true for release to other members of the FACMT; i.e., Medical Department Activity (MEDDAC), Social Work Services, Dental Activity (DENTAC),

Provost Marshall Officer (PMO), Staff Judge Advocate (SJA), etc. All play an important role in the FACMT process.

Suppose SSG X himself asks for the records of the pending investigation? Remember, there is a general law enforcement exemption under the Privacy Act. Also, the request would interfere with enforcement proceedings. So, the result would be a recommendation for denial of release to SSG X.

Suppose the trial counsel asks you for a copy of an MP report pertaining to a civilian employee who was apprehended for Driving Under the Influence (DUI) and possession of cocaine, and who may be fired. Do you release it? Again, the issue is, is there an official need to know? Here, the attorney is not asking for the record in order to satisfy some idle curiosity; rather, he needs it in order to do his job. If you have questions in this regard, ask the requester to state the official purpose for the request.

(2) Disclosure is required under the FOIA (AR 340-21, paragraph 3-1b). This avoids what would otherwise be a conflict between the two laws. If a record must be released under FOIA, the Privacy Act also will authorize release. Otherwise, it would result in a situation where I couldn't get my records under the Privacy Act, but you could get the same records, my records, under FOIA. This just wouldn't make any sense. Thus, if release is required under FOIA, the Privacy Act will not prohibit the release. To determine whether the release is required by FOIA, simply go back to the nine FOIA exceptions. FOIA, you will recall, is a disclosure statute. If you don't meet one of the exceptions, that means the record is to be disclosed. Only if you meet one of the exceptions can you justify withholding the record. Information is not released under FOIA if it is classified; it would constitute a clearly unwarranted invasion of personal privacy, etc. A simple way to look at this is as follows:

Would you be entitled, as a member of the general public, to my record under FOIA? If so, I cannot be denied my same record under the Privacy Act. In this way, the two statutes are in harmony with one another. The alternative would be a state of total chaos.

(3) Disclosure is permitted by a routine use that has been published in the Federal Register (AR 340-21, paragraph 3-1c). As was noted earlier, the Privacy Act requires the use of a Privacy Act Statement when personal information is requested from an individual that will become part of a system of records retrieved by reference to the individual's name or other personal identifier (paragraph 4-2a). This notice shall include the routine uses for which the information may be used (paragraph 4-2[a] 3). This simply means the use of such record for a purpose that is compatible with the purpose for which it was collected (5 USC Section 552a7). The routine uses will have been published in the Federal Register. In other words, if information were collected for a stated purpose, it would be strange if it could not be released to accomplish that purpose. The routine use provision allows us to do so.

(4) Disclosure to the Bureau of the Census for Planning or Carrying Out a Census or Survey (AR 340-21, Paragraph 3-1d).

(5) Disclosure to a recipient who has provided the agency with advance written assurance that the record will be used solely as a statistical research or reporting record, and the record is to be transferred in a form that is not individually identifiable (5 USC Section 552a [b] 5).

(6) Disclosure to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government (5 USC Section 552a [b] 6).

(7) Disclosure to another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity. This only applies if the activity is authorized by law and the head of the agency or instrumentality has made a written request to the Army element that maintains the record. The request must specify the particular portion desired and the law enforcement activity for which the record is sought (AR 340-21, Paragraph 3-1g). An example here is a request from the district attorney or the US Attorney for copies of MP reports pertaining to a Soldier who is being prosecuted in a civilian court.

(8) Disclosure pursuant to a showing of compelling circumstances affecting the health or safety of an individual. Upon disclosure, notice will be transmitted to the last known address of such individual (AR 340-21, Paragraph 3-1h).

(9) Disclosure to either the House of Congress or to the extent of matter within its jurisdiction, any committee or subcommittee thereof (AR 340-21, paragraph 3-1i).

(10) Disclosure to the Comptroller General, or authorized representatives, in the course of the performance of the duties of the General Accounting Office (AR 340-21, paragraph 3-1j).

(11) Disclosure pursuant to the order signed by a judge of a court of competent jurisdiction (5 USC Section 552a [b] 11). Note that this requires a court order, signed by a judge. A subpoena signed by the court clerk is not sufficient.

(12) Blanket routine uses. Earlier, it was noted that records may be released IAW the routine uses specified in the Privacy Act notice. In addition to these, there are several blanket routine uses, which apply across-the-board to all systems of records. As an example, records may be released to the Office of Personnel Management (OPM) concerning information on pay and leave, benefits, retirement deduction(s), and any other information necessary for OPM to carry out its legally authorized government-wide personnel management functions and studies (AR 340-21, paragraph 3-2 h). Another example is disclosure to a congressional office from the record of an individual in response to an inquiry from the congressional office made at the request of that individual (paragraph 3-2 d). Another is disclosure to foreign law enforcement, security, investigations, or administrative authority where such disclosure is in compliance with requirements imposed by, or to claim rights conferred in international agreements and arrangements including those regulating the stationing and status in foreign countries of DoD military and civilian personnel (paragraph 3-2 f). Still another example is disclosure to any component of the Department of Justice (DOJ) for the purpose of representing DoD, or any officer, employees, or member of DoD in pending or potential litigation to which the record is pertinent (paragraph 3-2 j). As an example, suppose PVT X has sued the US Army for violating his first amendment rights. Records can be released to DOJ in connection with its defense of the lawsuit. Other examples are release to the National Archives (paragraph 3-2 i) and release to state and local taxing authorities (paragraph 3-2 g).

A somewhat more common situation is release to federal, state, local, or foreign law enforcement agencies if the record indicates a violation or potential violation of law. The agency to which the records are released must be the appropriate agency charged with the responsibility of investigating or prosecuting the violation, or charged with enforcing or implementing the statute, rule, regulation, or order issued pursuant thereto (paragraph 3-2 a). An example would be the FACMT releasing records to a social welfare agency. Another example is releasing a record of a Soldier's DUI apprehension to state authorities.

6. Union Requests. The agency has an obligation under the Federal Labor Relations Act to furnish to the exclusive representative, or its authorized representative, upon request, and to the extent not prohibited by law, information that is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining. To be releasable, however, the information must NOT constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining (5 USC Section 7114[b] [4]). The failure to honor this duty may constitute an unfair labor practice under 5 USC Section 7116[a] [8]). This duty exists apart from FOIA and the Privacy Act. Coordinate with JAG before proceeding in this area, as release could violate the privacy rights of other employees. To avoid that, it may be necessary to delete references in the records to certain third parties.

7. Accounting for Disclosure. As was mentioned earlier, there are civil remedies for violating the Privacy Act. Willfully violating its terms may result in criminal liability (AR 340-21, paragraph 4-9). Due to the possibility of litigation over these matters, and to make sure that the laws are complied with, AR 340-21, paragraph 4-4a requires the appointment at the installation of an official to safeguard each system of records. This person (designated the FOIA/Privacy Act Advisor) is normally found in the AG office. It is essential that the agency have accurate records in case their actions are challenged in court. Also, the Privacy Act requires that an accounting be kept of disclosures, except those made within DoD (need to know) and those required to be made under FOIA (AR 340-21, paragraph 3-4).

8. Conclusion. When a general request for agency records, or a request by someone for someone else's records, is made, look to the exceptions under FOIA in order to determine if the material is releasable or not. Unless one of the exceptions under FOIA is met, the record is releasable. Where the requester is the subject of the records he is asking for, analyze the request under the Privacy Act. If the law enforcement exemption applies, records are not covered by the disclosure requirement of the Privacy Act. However, still evaluate the case under FOIA. Remember, the subject of the record has rights under both statutes. Records will be releasable to him unless they are exempt under BOTH. When any such requests are received, prompt action is imperative. If the applicable time limits are violated, the person responsible may end up in court trying to explain why.

Coordinate these actions with JAG. This is imperative. We must determine which exceptions/exemptions apply. Unless the request is properly handled, you may create needless litigation and expense, both for the Army and for yourself. Not knowing what to do in these situations is an invitation to a lawsuit.

PART C: THE STANDARD OD CONDUCT

1. Public service is deemed a public trust. Each American is entitled to have complete confidence in the integrity of his government (Executive Order 12731, October 19, 1990, section 101). Ethical principles must be placed above private interests. All DA personnel must avoid any actions, whether or not specifically prohibited by the regulation, that might result in or reasonably be expected to create the appearance of any of the following:

a. Using public office for private gain.

b. Giving preferential treatment to any person or entity.

c. Impeding government efficiency or economy.

d. Losing independence or impartiality.

e. Making a government decision outside official channels.

f. The perception that they are violating the law or the principles of ethical conduct.

The standards of conduct are contained in the JER, DoD 5500.7-R, August 1993, which supersedes AR 600-50 the former Standards of Conduct Revelation. The JER contains the standard of ethical conduct in the executive branch codified at 5CFR Part 2635, and the DoD Supplements thereto. They apply to all DA personnel. This includes Soldiers, civilian employees, NAF personnel, etc. The entire directive is punitive. This means that Soldiers who violate it are subject to punishment under UCMJ, as well as to adverse administrative action and other adverse action outlined by applicable to USC, sections or federal regulations. This may include separation from the service. Civilians who violate it are similarly subject to adverse administrative action and criminal prosecution as authorized by applicable section of the USC or federal regulations.

A Soldier, then, may face court-martial and separation from the service. A civilian may similarly face criminal prosecution in federal court and removal from the federal service. These violations are serious matters, and it is essential that our people be familiar with the regulatory requirements. For one thing, many of its provisions are based on federal criminal laws, some of which are felonies carrying substantial prison terms.

In the case of an MP officer, more is involved, however, than simply violating the law. You represent the government and law enforcement. You set an example by everything that you do. Subordinates of all ranks and positions will look to you for guidance. How people feel about you is how they will feel about the police in general, and about our entire system of military justice. You can represent something good (honesty, values, integrity, etc.), or you can represent something bad. You have no option of taking the middle ground; as law enforcement officers, you cannot just look the other way.

This area of the law is concerned with ethics; i.e., the principles of right and good behavior. Small violations breed large ones. As a leader, you set the tone of moral, ethical leadership. Your organization will follow the standards that you set. In simplest terms, our compliance or noncompliance with these rules says something about whom and what we are. We can, of course, choose to be honest, hardworking government employees. On the other hand, there is the option of dishonesty, or using government employment as a means of ravaging the public treasury. How seriously we follow the standards of conduct is a statement of which choice we have made.

2. Responsibilities of the Commander. You are, of course, leaders. To lead effectively, set a standard of uncompromising integrity. Do not just talk about ethics; be ethical. It is not enough for you to be proud of your troops; let them be proud of you.

As we mentioned above, you set the tone for your organization. An attitude of indifference toward ethics will spread like a plague throughout the unit, breeding lawlessness and a lack of discipline in general. You have to set an example of doing the right thing. You also must convince your subordinates to do so—not just because a regulation says so, but because it is the right thing to do.

When ethical dilemmas arise, subordinates will come to you for guidance. If you don't know the basic rules, you may inadvertently ignore the real problem. You may become an unwitting participant to its commission. Finally, part of your job will be to review the financial interests of subordinates in ascertaining whether or not they have a conflict of interest. In short, unless you understand the ethical rules (what they are and why we have them), you won't be a good leader.

3. Gratuities. A gratuity is simply a gift, favor, entertainment, hospitality, meal, transportation, loan, or other tangible item, and any intangible benefit[s] for which fair market value is not paid by the recipient. In other words, I am getting something for free, or at a reduced price. The provision covers gifts to the employee himself, as well as those given to the employee's immediate family and household members. To begin with, DA personnel are generally prohibited from accepting any gratuity, for themselves, family members, or others, directly or indirectly, from any source that:

a. Is engaged in or seeks business or financial relations of any sort with any DoD component.

b. Conducts operations or activities that are either regulated by a DoD component or significantly affected directly by DoD decisions.

c. Has an interest that may be substantially affected by the performance or nonperformance of the official duties of DoD personnel.

d. Offers or appears to offer the gratuity primarily because of the recipient's position as a DA officer or employee.

Here, the acceptance is prohibited simply due to the source of the gift. There is no requirement that the gift be in return for your being influenced in the performance of your official duties, or as a result of any official act, which you have performed, or which you will perform in the future.

There are several exceptions to this broad prohibition, listed at 5 Code of Federal Regulations (CFR) 2635.204 and .301. These include the following:

(1) Gifts of $20 or less. Employees may accept unsolicited gifts having an aggregate market value of $20 or less per occasion, for a maximum of $50 per year from any one source.

(2) Discount that is generally available to all DA military or civilian personnel.

(3) The acceptance of coffee, donuts, and similar refreshments of nominal value offered as a normal courtesy incidental to the performance of duty.

(4) Contractor provided transportation, meals, or overnight accommodations in connection with official business when arrangements for government or commercial transportation, meals, or accommodations are clearly impractical.

(5) The customary exchange of gifts between DA personnel and their friends and relatives, where the relationship is the motivating factor, not the business.

(6) Payment of travel expenses in connection with a job interview. If accepted, however, the employee will have to disqualify himself from taking any official action with regard to his potential employer, as his application for employment gives him a financial interest in the entity. The failure to disqualify him will result in the existence of a conflict of interest.

Even if the gratuity is not from a source mentioned previously, you may not accept a payment of money or other consideration as payment for an appearance, speech, or article that was done in an official capacity (5CFR 2635.202). As an example, if you went on Temporary Duty (TDY) and gave a speech at a conference, that was an official action. You cannot receive an outside source of

compensation for having done it. These payments are called "honoraria" and are prohibited as payments for official acts. You simply can't accept it. This prohibition includes payments for the writing of an article, when you wrote the article as an official act. You simply cannot receive an outside source of compensation for your government service.

The prohibition against the acceptance of honoraria is derived from the prohibitions in 18 USC Section 209. This statute prohibits the receipt of outside compensation for your service as a government employee. In other words, you cannot receive a supplementation of your salary from a private source, in payment for your performance of official duties. Your only legitimate source of compensation for the performance of official acts is your government salary. Violations of Section 209 carry a punishment of a fine or imprisonment for not more than 1 year, or both.

Gratuities come in various forms. Suppose that 1LT Blank in your office is working on an action that involves several commercial airlines, and one of which will be able to use the post airfield at a certain time. One of the airlines has sent him a check for $500 in return for his understanding that the final action will be in favor of this particular airline. Is this ok? The answer is no. This is a case of actual bribery. Bribery is simply where the gratuity is offered or given with the intent to influence any official act. It is a more serious crime, the maximum punishment being a $20,000 fine or three times the value of the bribe (whichever is greater) and imprisonment for 15 years (18 USC Section 201e). This applies when the employee accepts, or agrees to accept, the payment in return for his doing an official act. Both the offer and the acceptance are unlawful.

Even if there is no actual bribe, the employee still may not accept anything of value because of any official act performed or to be performed by him (18 USC Section 201 [a] [3]). This is similar to bribery, but the employee here is not doing the official act because of the gift (or the offer of a gift). Instead, he has already performed the official act, independent of any gratuity, and now he is being given a gift because of his official act. It is important to understand that federal law prohibits both situations. Even if there is no actual bribe, the acceptance of gratuities makes our actions look and feel bad. If I accept these things, it looks like I am doing my job in order to obtain the payments. The actions seem like kickbacks. It is essential that government employees not convey such impressions.

To use another example, suppose that 1LT X in your office has made a decision on a project, which just happens to have favored the ABC Company. The company is so grateful that it sends him season tickets to K.C. Chiefs football games. 1LT X is excited because he and his family have been loyal Chiefs fans for years. Can he accept? The answer is no. Remember, a government official may not ask for or receive anything of value "because of any official act performed or to be performed by him" (18 USC Section 201 g). There's no actual bribe here, but it is still illegal to accept outside compensation for having done your job.

4. Conflicts of Interest. An employee is prohibited from participating personally and substantially in an official capacity in any particular matter in which, to his knowledge, he or any person whose interests are imparted to him under this statute has a financial interest, if the matter will have a direct and predictable effect on that interest (5CFR 2635.402).

To use an example, suppose 1LT Jones in your office is working on the XYZ Project, developing the precise requirements that will later be used in connection with the actual contract. He mentions to you that he hopes the project goes through, as he owns stock in the XYZ Corporation. What do you do and why? Here, we have a classic conflict of interest. A government employee must avoid any conflict of interest. He cannot participate personally and substantially as a government employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or

otherwise in any particular matter in which he has a financial interest (18 USC Section 208a). The employee will have to disqualify himself from taking official action with regard to the XYZ Corporation. An alternative is for him to divest himself of the stock. It would not be enough for 1LT Jones to simply transfer the stock to his wife. The statute includes interests of the individual, as well as those of his/her spouse. Both are subject to the conflict of interest prohibition and both are considered, in effect, to constitute the financial interests of the DA employee. Also, the private interests of a spouse, dependent child, and any household members are treated as private interests of DoD personnel.

If a person is disqualified due to a conflict of interest, the action will NOT be assigned to someone who is subordinate to him. Such a transfer really doesn't solve the problem. Indeed, the one with the conflict of interest is still in charge of the decision-making problem.

Also, by negotiating with employment, a government employee is deemed to have a financial interest in the companies he is negotiating with. The term negotiating includes any action by DA personnel that reasonably could be construed as an indication of interest in future employment, including sending letters or resumes, making telephone inquiries, or failing to clearly reject a personally directed proposal from the entity's representative regarding future employment (5 CFR 2635.402). This does not require that there has been a firm offer of employment.

5. Outside Employment and Other Activities. The basic rule is that DA personnel are encouraged to engage in teaching, lecturing, and writing. Outside employment and other activities are prohibited if the employment/activity:

a. Interferes, or is not compatible, with the performance of their government duties.

b. May reasonably be expected to bring discredit upon the government or DA.

c. Is otherwise inconsistent with the requirements of the JER. This includes the requirement to avoid actions that reasonably can be expected to create a conflict or the appearance of a conflict of interest (5CFR 2635.801).

Suppose, for example, that 1LT Smith works for you. Part of his job includes assessing the physical security at the on-post museum, and making sure that the contractor has done his job right. The physical security function has been contracted out to the ABC Company, which provides the guards. 1LT Smith now has gone to work for the ABC Company, and will be working evenings as a supervisor of the guards. Is this all right? The answer is no, as this situation presents a conflict of interest. His government duties will involve his grading his own performance as an employee of the contractor. One cannot be expected to serve two masters. This is an example of the type of outside employment that would be improper.

MPI agents, as an example, cannot engage in outside employment without written command approval. This approval will specify the nature of the off-duty employment authorized and will note any particular limitations being imposed. If you have questions about the off-duty employment of your people, consult with JAG. Where the activity constitutes a conflict of interest, or otherwise is improper under, it may be prohibited.

6. Use of Government Facilities. The rule is that government facilities, property, and work assistance will be used only for official government business. This includes, but is not limited to, stationary, stenographic services, typing assistance, duplication, and chauffeur services. DA personnel will not

directly or indirectly use, or allow the use of, government property of any kind, including property leased to the government, for other than official purposes. This applies to the use of office equipment and personnel. It also applies whether or not you are acting for the purpose of commercial gain. As an example, you can't type personal correspondence on the office typewriter, or use the Federal Telecommunications Service (FTS) line to engage in personal business. Similarly, don't use the office secretary to type personal matters, or copy them on the office copy machine (5CFR 2635.704 and .705).

7. Use of Civilian and Military Titles. The rule is that DA personnel may not use their titles or positions to endorse any commercial project. You can give your personal views regarding the merits of the product, but you must make it clear that your comments may not be used as an official endorsement of their publication. Also, DA personnel may not use their titles or positions in connection with any commercial enterprise (5CFR 2635.702 and .807). As an example, if one of your employees is a part-time owner of a local restaurant, he can't advertise by using his official position. This rule does not prevent our people from publishing books or articles, which identify them as authors by reference to their title or position, provided that publication of such material has been, cleared IAW AR 360-5 (Public Affairs Office [PAO]).

8. Gambling. DA personnel will not participate in any gambling activity while on government owned, controlled, or leased property, or otherwise while on duty for the government. This includes lotteries, pools, games for money or property, or the sale or purchase of number slips or tickets. There is an exception for activities specifically approved by HQDA. This includes Monte Carlo nights, bingo, and other activities approved under the Army Club System (DoD 5500.7-R Section 2-302).

Football/baseball pools are illegal lotteries. This is different from the midnight "Strike-o-Rama" at the post bowling alley. There, you pay $.25 apiece for tickets that go into a large box. If your number is drawn, you get a chance to throw a strike. If you do so, you win $100. This is legal, because it is a demonstration of skill, and not simply blind luck. In our bowling example, the prize is not awarded on the basis of random chance, but is dependent on the skill of the bowler; i.e., you must demonstrate sufficient skill at bowling by throwing the strike. Otherwise, you win nothing, even though your ticket was drawn. It is not, therefore, a form of prohibited gambling. It must not, however, be a mere subterfuge. Suppose your on-post chess club wants to hold a lottery, but you know that gambling is illegal. You, therefore, decide to make it a demonstration of skill/knowledge. The person whose ticket is drawn is asked a question. Only if he can correctly answer the question will he win a prize. The question is: Name one of the first 10 presidents of the United States. Is this ok? The answer, of course, is no. Here, there is no bona fide demonstration of skill or knowledge. This is simply an attempt to circumvent the regulation. As police officers, you need to do a better job than this of complying with the law. We must set an example of following, not violating, the law. This sort of "contest" is a mere sham. The demonstration of knowledge/skill must be genuine. Here, it is not.

9. Use and Release of Nonpublic Information. DA personnel will not engage in any personal business or professional activity, or enter into any financial transaction, that involves or appears to involve, the direct or indirect use of inside information to further a private gain for themselves or others. An employee shall not directly or indirectly make use of, or permit others to make use of, for the purpose of furthering a private interest, official information not made available to the general public (5CFR 2635.703).

To use an example, suppose that as part of your job, you know that the CID/MPI will be switching to the use of the ABC Crime Computer System. Your office, in fact, has helped to lay the groundwork for the future contract, which will be awarded sometime in 2008. You also know that

there is a 99 percent chance that IBM will get the contract, since it is the only company that will be able to produce what the Army wants within the time restraints that will be imposed. Everything is still in the preliminary stage, and nothing has yet been released to the public. You immediately go out and buy up all of the IBM stock that you can lay your hands on. Your goal is to get rich once the contract is awarded, as the IBM stock, which you own, will rise in value. Is this legal? The answer is no, as this is what this prohibition is aimed at preventing.

A similar problem is where the DA employee doesn't use the inside information for private gain, but unlawfully releases the information to a third party. DA personnel are prohibited from releasing to an individual or business concern, or its representative, any knowledge such persons may possess or have acquired in any way concerning proposed acquisitions or purchases by any contracting activity of the DA. Such information will be released to all potential contractors as nearly simultaneously as possible. These releases will be made only through duly designated agencies, so that one potential source of supply may not be given an advantage over another. Transactions related to the expenditure of public funds require the highest degree of public trust and an impeccable standard of conduct (Federal Acquisition Regulation [FAR] Section 3.101-1). This is necessary in order to preserve the integrity of the acquisition process (FAR Section 5.401). The premature release of contracting information jeopardizes the entire procurement system and can result in lengthy and costly litigation.

Another rule in the contracting area is that the government is prohibited from awarding a contract to a government employee, unless government needs cannot otherwise be met or there is some other compelling reason. The purpose of the prohibition is to avoid any conflict of interest that might arise between the employees' interests and their official duties, and to avoid the appearance of favoritism or preferential treatment by the government toward its employees (FAR Section 3.101-1).

10. Gifts. DA personnel will not solicit a contribution from other DoD personnel for a gift to an official superior; make a donation or a gift to an official superior; or accept a gift or donation from DoD subordinate personnel. This does not prohibit the giving or accepting of truly voluntary gifts or contributions of minimal value on special occasions. Such occasions include marriage, transfer, illness, or retirement. The gift cannot exceed a minimal value, which means that it is primarily of a sentimental nature. Examples of permissible gifts are privately prepared photo albums, an engraved tray or plaque, a pen and pencil set. An example of an improper gift would be an engraved shotgun or a silver set. You may give an individual gift to a superior costing $10.00 or less, and contribute to shared food and refreshments on other less significant occasions (5USC 7342).

11. Use of Official Position. DA personnel are prohibited from using their official positions to induce, coerce, or in anyway influence any person, including subordinates, to provide any unauthorized benefits, financial or otherwise, to themselves or others. Suppose, for example, that 1LT X works for you. His brother owns a service station off-post. 1LT X tells subordinates in the office that if they ever need auto repair work, the way to get ahead at work is to make sure they take their business to his brother. Is this permissible? The answer, of course, is no (5CFR 2635.702).

12. Commercial Solicitation and Sales. To eliminate the appearance of coercion, intimidation, or pressure from rank, grade, or position, DA personnel will not make personal commercial solicitations or sales to DoD personnel who are junior in rank, grade, or position (DoD 5500.7-R Section 2-205).

As an example, suppose 1LT Jones in your office is an Herbalife and Amway distributor. One morning, he brings his various brochures to work with him and goes up to each person in the office, trying to drum up business. Is this permissible? The answer is no. Also, note that the prohibition

applies at anytime, both on and off duty. It does not, however, apply to the sale of personal property not held for commercial or business purposes. A sale of personal property at a garage sale would be permissible. It also does not apply to the sale or lease, by a person, of a privately owned former residence. It also does not apply to the off-duty employment of DA personnel or their spouses as employees in retail stores or other situations not involving personal commercial solicitation. The prohibition covers personal commercial solicitation, which means "those situations where DA personnel are employed as a sales agent, on commission or salary, of the commodity, real or intangible, that is being offered for sale."

13. The Standard od Conduct - A final Look.

As a supervisor, you will be called upon to resolve many of these problems. You cannot solve a problem, however, unless you first are able to recognize it AS A PROBLEM. As we have seen, these issues arise in a variety of forms. Unless you know what to look for, you probably won't find it. At the same time, you also won't recognize it when it stares you in the face. The problem is that when you ignore the situation, it doesn't just go away on its own. It may lay dormant for a while, but you can rest assured that it will resurface in a much uglier form. By ignoring the problem, today's dilemma simply festers until it becomes tomorrow's disaster. Respect for the law breeds respect for the law. Contempt for the law breeds contempt for the law. It is as simple as that.

Practice Exercise

1) Under the FOIA, the term "IDA" stands for:

   a) Immediate Decision Act.
   b) Initial Denial Authority.
   c) Individual Determination Agent.
   d) Initial Determination Aide.

2) For MP reports, the IDA is located at:

   a) USACIDC.
   b) TRADOC.
   c) FORSCOM.
   d) DARCOM.

3) The Army regulation, which mandates compliance with the FOIA, is:

   a) AR 190-21.
   b) AR 210-20.
   c) AR 300-51.
   d) AR 25-55.

4) An FOIA request may be made by:

   a) A real person.
   b) A business.
   c) A corporation.
   d) All of the above.

5) Which of the following is an FOIA exemption?

   a) Materials related to an agency's mission.
   b) Materials related to humanitarian concerns.
   c) Classified records.
   d) Corporate records.

6) To be exempt from disclosure under FOIA, a record must:

   a) Be at least 2 years old.
   b) Be no more than 1 year old.
   c) Meet one of nine statutory exemptions.
   d) Relate to the agency's mission.

7) Who can request a record under the Privacy Act?

   a) A friendly foreign government.
   b) A citizen of the United States.
   c) A hostile foreign government.
   d) All of the above.

8) Under the Privacy Act, the term "AARA" stands for:

a) Agency Authorized Research Aide.
b) Agent for Action Research Associate.
c) Agency Assistant Review Authority.
d) Access and Amendment Refusal Authority.

9) For MP records, the AARA is at:

a) FORSCOM.
b) TRADOC.
c) DCSPER.
d) Each installation.

10) Under the Privacy Act, exemptions from disclosure are claimed by:

a) Secretary of the Army.
b) Major Command (MACOM).
c) Staff Judge Advocate (SJA).
d) Provost Marshall Office (PMO).

11) The Standards of Conduct are found in:

a) AR 210-10.
b) AR 350-100.
c) AR 550-50.
d) DoD 5500.7-R.

12) The Standards of Conduct apply to:

a) Active duty personnel.
b) DA civilian employees.
c) Naval Air Facility (NAF) employees.
d) All of the above.

13) The directive containing the "Standards of Conduct" is:

a) Punitive.
b) Nonpunitive.
c) Elective.
d) None of the above.

14) MP reports:

a) Are covered by the FOIA.
b) Are all exempt from the FOIA.
c) Are covered by the FOIA at the commander's discretion.
d) Are covered by the FOIA if the Adjutant General (AG) so elects.

15) FOIA is:

a) A withholding statute.
b) An avoidance statute.
c) A disclosure statute.
d) A copyright statute.

16) Under FOIA, fees may be charged for:

a) Search, duplication, and review.
b) JAG consultation fees.
c) A flat rate of $25 per request.
d) A flat rate of $10 per document.

ANSWER KEY AND FEEDBACK

Item	Correct Answer and Feedback
1.	B. Initial denial authority. The official at HQDA who has the authority to make the decision to deny release is the IDA (Initial Denial Authority) (page 8).
2.	A. DCSPER. Where all or part of a record is not to be released, the matter will be submitted up to HQDA, to the IDA for decision. Remember that for MP reports, this is the DCSPER (page 11).
3.	D. AR 25-55. AR 25-55 paragraph 1-300 (page 3).
4.	D. All of the above. This is not limited to natural persons, and includes corporations, businesses, associates, etc. (page 5).
5.	C. Classified Records. Classified records (page 8).
6.	C. Meet one of the nine statutory exemptions. To be exempt, a record must fall under one or more of nine exemptions (page 8).
7.	B. A citizen of the United States. This is a citizen of the United States or an alien lawfully admitted for permanent residence (page 12).
8.	D. Access and Amendment Refusal Authority. Access and Amendment Refusal Authority, or "AARA" for short (page 12).
9.	C. DCSPER. For MP records, the AARA is again, the DCSPER (page 11).
10.	A. Secretary of the Army. The second reason for not disclosing a record under the Privacy Act is that the record is properly exempted by the Secretary of the Army from the disclosure provisions of the Privacy Act (page 13).
11.	D. DoD 5500.7-R. The standards of conduct are contained in the Joint Ethics Regulation (JER), DoD 5500.7-R (page 19).
12.	D. All of the above. This includes Soldiers, civilian employees, NAF personnel, etc. (page 19).
13.	A. Punitive. The entire directive is punitive (page 20).
14.	A. Are covered by the FOIA. The release of such records must be IAW the FOIA and the Privacy Act (AR 190-45, paragraph 3-4) (page 3).
15.	C. A disclosure statute. The FOIA (5 USC Section 552) - A Disclosure Statute (page 4).
16.	A. Search, duplication, and review. Fees may be charged for search, duplication, and review when the records are requested for commercial purposes. Fees may be . . . (page 6).